IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re Marriage of CHRISTOPHER N. GUDJOHNSEN, Respondent, v. LOUISE ANN ABRAMS, Appellant.	No. 37372-6-II UNPUBLISHED OPINION

Armstrong, J. — Louise Ann Abrams appeals a dissolution decree, arguing that the trial court erred in characterizing and distributing property and in failing to require her ex-husband, Christopher Gudjohnsen, to pay additional maintenance. We hold that the trial court improperly characterized the property and also erred by failing to place a value on the parties' real property, their most significant asset. Because of these errors, we vacate the decree and remand for the trial court to redistribute the assets and revise the maintenance award.

FACTS

Abrams and Gudjohnsen began dating in 1997 or 1998. At that time, each owned a home. In 1998, Gudjohnsen sold his home and moved in with Abrams so that he could purchase a piece of undeveloped property. He used part of the proceeds to contribute rent to Abrams.

In 1998, Gudjohnsen purchased vacant land in Camas, Washington, for $141,900. He paid for the land with approximately $61,000 from his separate funds and financed the balance, approximately $88,000, with a loan. Although Gudjohnsen offered to name Abrams on the deed, she declined, and Gudjohnsen took title in his name alone.

Abrams and Gudjohnsen married on August 21, 1999. They continued to live in Abrams's home, and they discussed borrowing money so they could improve the Camas property. In April 2000, the parties jointly applied for, and received, a $123,750 loan. They used part of the loan to pay the balance on Gudjohnsen's $88,000 loan.

As part of the loan process, Gudjohnsen signed a quitclaim deed conveying the property from his separate estate to the community for "love and affection." Report of Proceedings at 70. Gudjohnsen testified that he hesitated in signing the deed but the loan officer said he had to sign the deed to get the loan. Gudjohnsen claims that he was unaware that the deed transferred his interest in the property to the community. Abrams stated the opposite: that Gudjohnsen knew what he was signing and did not hesitate to sign it. The parties refinanced the loan two more times during their marriage. Each time, they both signed the loan documents, and the community credit served as a basis for the loan. They also made the monthly loan payments with community funds.

After acquiring the loan, Abrams and Gudjohnsen felled approximately 40 trees on the Camas property. They also purchased a double-wide trailer for $16,140, and moved it onto the property. Both parties' names are on the title to the trailer but Gudjohnsen purchased it with money he acquired before their marriage.

The parties moved into the trailer and rented out Abrams's home. Abrams deposited the rental proceeds into a community bank account. In 2003, Abrams sold her property for $28,000, investing $15,000 of the proceeds and depositing $5,000 in a community account. She testified that she used the remaining $8,000 to build a workshop on the Camas property. Gudjohnsen

disagreed, and Abrams produced no documents showing her separate contribution to the workshop.

On February 12, 2007, Abrams and Gudjohnsen separated.[1] By that time, they had improved the Camas property with the double-wide trailer, a pump house, a garden shed, and a workshop. The property still had three-and-one-half acres of standing timber, which an appraiser valued at about $21,000.

On February 14, 2007, Gudjohnsen petitioned to dissolve the marriage. CP 1.

A. Financial and Health Status of the Parties

At the time of trial, Abrams was 60 years old, and although she had worked as a cabinet maker for almost 18 years, she was unemployed when the parties separated in 2007. She had been receiving $1,066 per month in social security disability checks for about four years. Abrams has degenerative arthritis in her back, neck, shoulders, and knees. She has had both hips replaced and needs a knee replacement. Abrams's condition is deteriorating, and she is unlikely to return to work. Her only income aside from social security is approximately $300 per year she earns house sitting. She has a high school education, and she has no retirement savings. Her projected monthly expenses were $2,763 in 2007. During the dissolution proceedings, Gudjohnsen paid Abrams $300 per month in maintenance. She was living with a friend but was expected to move out after the dissolution was final.

In comparison, Gudjohnsen was 52 years old at the time of trial and employed as a truck driver. He made $36,564 in 2006. He has been employed by Rapid Transfer for 31 years and is a member of the Teamsters Union. Except for his hearing loss, he is in good health. Gudjohnsen

[1] Neither party has any dependent children.

has no money in savings, but he has a pension, which will pay him approximately $2,400 per month when he retires.

B. Characterization and Value of Marital Estate

Abrams asserted that the Camas property was community property because of the quitclaim deed that Gudjohnsen signed when they refinanced the property. After Abrams failed to document the contribution, the trial court rejected her assertion that she had contributed $8,000 of her separate funds toward constructing the workshop. The trial court found that any community funds used to improve the property did not exceed the reasonable rental value of the property—the benefit to the community of being able to live on the property. Consequently, the trial court characterized the Camas property and the trailer as separate property after finding that Gudjohnsen had adequately traced the separate funds that he used to purchase the property.

Abrams testified that the Camas property was worth $325,000, and her expert testified that there was an additional $21,000 in timber on the property. In contrast, Gudjohnsen asserted that the property was worth $223,100. The trial court did not assign value to the property, specifically refused to include the value of the timber in dividing the property, and required Abrams to pay the timber appraiser's fees.

C. Distribution of Marital Estate

The trial court recognized that Gudjohnsen makes about three times more income than Abrams. The court also acknowledged Abrams's physical limitations that impact her ability to be employed. Nevertheless, the court awarded the entire Camas property, including the trailer, to Gudjohnsen and made him responsible for the $132,000 debt on the property.

The trial court awarded Abrams her separate property investment account worth about $17,000, and half of that part of Gudjohnsen's pension account attributed to the community. The court also ordered Gudjohnsen to pay $3,000 of Abrams's attorney fees.

Each party also received various items of personal property.

D. Maintenance

Abrams requested $500 per month in maintenance until Gudjohnsen retires and she can access her portion of his pension. The court awarded her $300 per month through December 2008.

ANALYSIS

I. Property Characterization

Abrams contends that the trial court erred in characterizing the Camas property as Gudjohnsen's separate property. Property characterization is a question of law that we review de novo. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003) (citing *In re Marriage of Skarbek*, 100 Wn. App. 444, 447, 997 P.2d 447 (2000)). We review findings of facts for substantial supporting evidence. *Skarbek*, 100 Wn. App. at 447. We will not set aside a trial court's mischaracterization of property if the trial court's property distribution and maintenance award are just and equitable. *See In re Marriage of Kraft*, 119 Wn.2d 438, 449, 832 P.2d 871 (1992) (citing *Baker v. Baker*, 80 Wn.2d 736, 745-46, 498 P.2d 315 (1972)).

The trial court must generally characterize property as of the time it is acquired. *Skarbek*, 100 Wn. App. at 447. The court presumes that property acquired before marriage is separate property. *See In re Marriage of Hurd*, 69 Wn. App. 38, 50, 848 P.2d 185 (1993) (citations

omitted). This presumption remains until there is direct and positive evidence to the contrary. *In re Estate of Madsen*, 48 Wn.2d 675, 676-77, 296 P.2d 518 (1956) (citing *Hamlin v. Merlino*, 44 Wn.2d 851, 272 P.2d 125 (1954)). As long as separate property can be traced and identified, the court will not characterize it as community property unless the separate property is commingled to the extent that the court cannot distinguish or apportion it from the community property. *Chumbley*, 150 Wn.2d at 5-6 (citing *In re Marriage of Pearson-Maines*, 70 Wn. App. 860, 865, 855 P.2d 1210 (1993)).

A. Quitclaim Deed

First, Abrams asserts that the quitclaim deed converted Gudjohnsen's separate property into community property.

A writing is required to show the parties' mutual intent to convert separate property into community property. *In re Estate of Verbeek*, 2 Wn. App. 144, 158, 467 P.2d 178 (1970). Division One has held that when one spouse uses his or her separate funds to purchase property but later executes a deed conveying the property to the community "for love and affection," absent any other explanation, the court presumes that the transferring party intended a gift to the community. *Hurd*, 69 Wn. App. at 51. And the party claiming a continuing separate interest must rebut this presumption with clear and convincing evidence. *Hurd*, 69 Wn. App. at 51.

Division One recently revisited this issue, however, in *In re Estate of Borghi*, 141 Wn. App. 294, 169 P.3d 847 (2007), *review granted*, 163 Wn.2d 1052 (2008). In *Borghi*, the court explained that there may be a lack of intent to benefit the community when the transaction involves "accommodation of a mortgagee, duress or deception, or an unsolicited act of a third

party in preparing the document." *Borghi*, 141 Wn. App. at 303. On the other hand, the court noted that in a deed conveying separate property to the community, one spouse's intent to benefit the community was evidenced by including the language "for love and consideration." *Borghi*, 141 Wn. App at 302-03. The court also pointed out that there was no evidence that the property-owning spouse in that case protested adding her spouse to the title. *Borghi*, 141 Wn. App. at 303-04.

Despite this evidence of the spouse's intent to convey the property to the community, the *Borghi* court believed it was bound by *In re Estate of Deschamps*, 77 Wash. 514, 517-18, 137 P. 1009 (1914),[2] in which the Washington Supreme Court held that the surviving husband had failed to prove his wife's intent to convert her separate property to community property, even though the husband was named as joint grantee on the deed conveying the property. The husband also testified that he contributed stock and money to the trade and that the community made the mortgage payments on the property, and two other witnesses testified that the wife intended that the community would take title to the property. *Deschamps*, 77 Wash. at 516-18. The court was plainly skeptical of the husband's claim. It reasoned that the husband's claim to have contributed money was undisputed but also unsupported and that the stock was apparently worthless. *Deschamps*, 77 Wash. at 516. And, even if the husband made the payments he claimed, they were insufficient to give him a community interest in the property. *Deschamps*, 77 Wash. at 516. The court expressed its concern that "[t]he mouth of the wife is closed in death" and held that the community property presumption for property held in both spouses' names was rebuttable.

[2] *Borghi* points out that the *Hurd* court failed to discuss or cite *Deschamps.* *Borghi*, 141 Wn. App. at 301.

Deschamps, 77 Wash. at 518. The court found that it "will not be bound by the terms of the deed but will look beyond it and ascertain, if possible, the true intent and purpose of the parties" and concluded that the husband had not proved his community property claim. *Deschamps*, 77 Wash. at 518. The *Borghi* court read *Deschamps* as holding that a deed to the community was insufficient to raise a presumption of community property, contrary to *Hurd*. We disagree. *Deschamps* recognized the presumption but was critical of the husband's evidence "beyond" the deed, particularly because his wife could not contradict it.

In any event, *Deschamps* is distinguishable. Here, in addition to the "love and affection" deed, the evidence showed that Gudjohnsen offered to name both parties on the title when he first purchased the property. Then, less than a year after the parties married, the parties used community credit to obtain a new community loan, with which Gudjohnsen paid off his separate loan. The community made the payments on the new loan and twice later refinanced the property with community secured loans. They also improved the property with both community funds and labor.[3] Finally, Gudjohnsen purchased a double-wide trailer with his separate funds but added Abrams's name to the title. We are satisfied that if the deed and surrounding evidence is insufficient to show as a matter of law that Gudjohnsen intended to convert the separate property to community property, it at least raised a strong presumption that Gudjohnsen intended to gift his separate interest in the property to the community. *Hurd*, 69 Wn. App. at 51; *see also Kuhnhausen v. England*, 79 Wn.2d 282, 286-87, 484 P.2d 1135 (1971) (finding that refinancing in the form of a purchase money mortgage could make the transaction a new property acquisition,

[3] The trial court here found that the community contribution to the property was offset by the community's benefit from living on the property. This analysis unfairly charges the community with the rent burden and awards the full property appreciation to Gudjohnsen.

thereby converting the separate property to community).

II. Property Distribution and Maintenance

Abrams maintains that the trial court erred by failing to evaluate disputed assets and by leaving the parties in significantly disparate financial circumstances. We agree.

Trial courts have broad discretion in distributing property and liabilities in marriage dissolution proceedings. *See* RCW 26.09.080. The trial court must make a "just and equitable" distribution of the marital property after considering (1) the nature and extent of separate and community property, (2) the duration of the marriage, and (3) the economic circumstances of each spouse at the time of division. RCW 26.09.080. Although property characterization is a factor to be considered in property distribution, it does not control its disposition. *Worthington v. Worthington*, 73 Wn.2d 759, 768, 440 P.2d 478 (1968) (citations omitted). "The key to an equitable distribution of property is not mathematical preciseness, but fairness." *In re Marriage of Clark*, 13 Wn. App. 805, 810, 538 P.2d 145 (1975). To reach a fair result, the trial court must consider all circumstances of the marriage and exercise discretion, rather than apply inflexible rules. *Clark*, 13 Wn. App. at 810. The trial court is not required to make an equal division, but it must make an equitable one. *In re Marriage of Nicholson*, 17 Wn. App. 110, 117, 561 P.2d 1116 (1977). In fact, appellate courts frequently uphold disproportionate property awards, awarding more income to a spouse who is unable to work. *See*, *e.g.*, *In re Marriage of Donovan*, 25 Wn. App. 691, 696-97, 612 P.2d 387 (1980) (awarding untrained wife about two times the amount of assets after 14-year marriage when husband could still work as commercial pilot).

A. Value of Assets Distributed

A court's complete failure to value an asset is generally not significant enough to warrant

reversal as long as the trial court has made a fair, just, and equitable division of the marital property. *In re Marriage of Wright*, 78 Wn. App. 230, 237, 896 P.2d 735 (1995). But when the value of property is in dispute, a trial court's failure to value an asset may make it impossible for us to determine whether the property division was just and equitable. *In re Marriage of Greene*, 97 Wn. App. 708, 712, 986 P.2d 144 (1999).

Here, the trial court did not value the Camas property, and the parties disputed its value.[4] Abrams maintained that it was worth $325,000, and Gudjohnsen contended that it was worth $223,100. Because there is little property to distribute between the parties, the $100,000 dispute over the Camas property value is significant. The trial court erred in failing to value the property before distributing it. And the trial court's mischaracterization of the Camas property aggravated the error resulting in Abrams receiving no interest in it.

B. Maintenance

The trial court further aggravated the error by making a nominal maintenance award. The court's paramount concern in dissolving a marriage is the economic circumstances of each spouse at the conclusion. *DeRuwe v. DeRuwe*, 72 Wn.2d 404, 408, 433 P.2d 209 (1967). A court must consider the financial resources of the parties, including property division, when determining maintenance, and it should award maintenance based on need and ability to pay. *In re Marriage of Mueller*, 140 Wn. App. 498, 510, 167 P.3d 568 (2007), *review denied*, 163 Wn.2d 1043 (2008); RCW 26.09.090(1)(a). Maintenance must be equitable for "such periods of time as the court deems just." RCW 26.09.090(1)

[4] The parties also disputed the value of various personal property, but the amount in dispute is not as significant as the dispute over the Camas property.

A trial court's property distribution is not just and equitable when it leaves one spouse destitute compared to the other spouse. *See Marriage of Olivares*, 69 Wn. App. 324, 335, 848 P.2d 1281 (1993). Here, the trial court failed to award Abrams any interest in the real property, the parties' only substantial asset, and it also failed to give her any meaningful amount of maintenance. Yet it was undisputed that Gudjohnsen earned three times what Abrams did and that he continues to work as a truck driver. Although Abrams has some savings, she is disabled and her social security and house sitting income does not cover her monthly expenses. Thus, the trial court's maintenance award highlighted its disparate treatment of the parties in dividing the property.

Because we cannot find the trial court's division of property and maintenance award fair and equitable, we must reverse. On remand, if Gudjohnsen fails to rebut the presumption of community property by clear and convincing evidence, the trial court must treat the property as community. If the trial court finds that Gudjohnsen has rebutted the presumption, the court must still consider the community interest in the property, including the extent to which the community labor and money contributed to the property's appreciation. *In re Marriage of Elam*, 97 Wn.2d 811, 816-17, 650 P.2d 213 (1982). The court must then again address the maintenance award in light of its property division. RCW 26.09.090(1)(a).

III. Attorney fees

Both parties seek an award of attorney fees. Because Abrams has shown both her need and Gudjohnsen's ability to pay, we award her attorney fees in an amount to be determined by a commissioner of this court, provided that Abrams complies with RAP 18.1(d). RAP 18.1(f).

We vacate the decree and remand to a different trial judge to redistribute the assets and revise the maintenance award.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Hunt, J.

Van Deren, C.J.